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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

ATTN: The Review Board

RE: Central Florida Educational Foundation, Inc., et. al., MM
Docket No. 92-33

Dear Ms. Searcy:

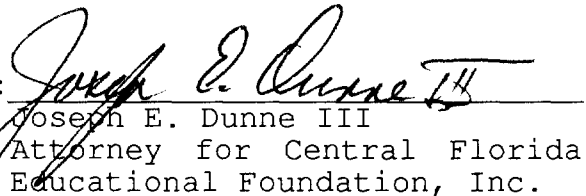
Transmitted herewith, on behalf of Central Florida Educational Foundation, Inc., is an original and eleven copies of its "Contingent Exceptions To Initial Decision" filed in connection with the above-referenced docketed proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

MAY & DUNNE, CHARTERED

By:


Joseph E. Dunne III
Attorney for Central Florida
Educational Foundation, Inc.

JED:gmcA41
enclosures

xc: All Per Attached Certificate of Service
James S. Hoge

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BEFORE THE

OCT 16 1992

Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20554

In re Applications of)	MM Docket No. 92-33
)	
CENTRAL FLORIDA EDUCATIONAL)	File No. BPED-881207MA
FOUNDATION, INC.)	
Channel 203C3)	
Union Park, Florida)	
)	
HISPANIC BROADCAST SYSTEM, INC.)	File No. BPED-891128ME
Channel 202C3)	
Lake Mary, Florida)	
)	
For Construction Permit for a)	
New Noncommercial Educational FM)	
Station)	

TO: The Review Board

CONTINGENT EXCEPTIONS TO INITIAL DECISION

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October 16, 1992

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New Noncommercial Educational FM)	
Station)	

TO: The Review Board

CONTINGENT EXCEPTIONS TO INITIAL DECISION

Central Florida Educational Foundation, Inc. (Central Florida), by its undersigned attorney and pursuant to section 1.276 of the Commission's rules and regulations, 47 C.F.R. § 1.276 (1992), hereby files these contingent exceptions to the Initial Decision of Administrative Law Judge Edward J. Kuhlmann, FCC 92D-59, released September 16, 1992. In support of its contingent exceptions, Central Florida shows and states as follows.

I. STATEMENT OF THE CASE

1. This case now involves the mutually exclusive applications of Central Florida and Hispanic Broadcast System, Inc (Hispanic) for FM channel 203C3. Central Florida seeks to build a new noncommercial FM broadcast station in Union Park, Florida. Hispanic seeks to construct a new noncommercial FM station in Lake Mary, Florida. In his Initial Decision the Presiding Officer

determined that 307(b) considerations were dispositive of this case, and that Central Florida's proposal provided service to 42,273 persons (or 8 percent) more than Hispanic, and second service to 45,984 (or 33 Percent) more than Hispanic. (I.D. ¶ 13.) Based on these facts, the Presiding Officer found that "Central's provision of service to a substantial gray area leads to the conclusion that its proposal will best serve the public interest." (I.D. ¶ 14.) Central Florida obviously has no complaints concerning the Presiding Officer's conclusion, and believes (as does the Mass Media Bureau) that the Presiding Officer correctly decided the case. Central Florida submits these contingent exceptions, however, in the event that the Review Board rejects the Initial Decision's conclusion that 307(b) considerations are dispositive of the case, and considers the Initial Decision's findings and conclusions with respect to the other issues designated in this proceeding. Central Florida's exceptions should be considered if, and only if, the Presiding Officer's conclusion is wholly overturned.

2. There was no oral hearing conducted in this proceeding, the applicants submitted their hearing exhibits by stipulation (Tr. 15), and the Presiding Officer rejected certain exhibits upon motion of the Mass Media Bureau (Tr. 29-30, 31, 34). The written exhibits submitted by the applicants then became the record upon

which the Presiding Officer's decision was based. Despite the fact that the record for decision was essentially unchallenged, the Presiding Officer did not make certain essential factual findings, fully supported by the record, that are relevant to the resolution of issue number two. For example, the record shows that Central Florida has three principals, two of which plan to work at its proposed station full-time (Fdgs. ¶ 25). The principals who will be working at the proposed station have a combined 20 years of broadcast experience in the same radio market as its proposed station (Fdgs. ¶ 26) and, moreover, have experience owning and operating noncommercial educational radio stations (Id.). Both Central Florida principals who will work at the station have lived in the service area for some time, in one instance, since 1968 (Fdgs. ¶ 26). Central Florida's directors have adopted eight specific objectives for the station, all of which can accurately be characterized as "outwardly directed" (Fdgs. ¶ 16). Central Florida's principals have personally conducted community leader interviews to determine the problems, needs and interests of the community, and discussed those problems with community members at remote broadcasts, at local churches, and at community events sponsored by the radio station, WTLN, of which they are both principals (Fdgs. ¶ 23). Both Central Florida principals have also monitored the discussion of community needs mentioned in other

media outlets (Fdgs. ¶ 21) and on call-in and public affairs programming on WTLN (Fdgs. ¶ 22). These ascertained community problems and needs were used to formulate Central Florida's program proposal (Fdgs. ¶ 22, 23). Central Florida's program proposals are an outgrowth of existing programs produced by its principals (Fdgs. ¶ 23, 26), and those principals have extensive experience in producing the sort of programming, including Spanish language programming, that Central Florida proposes to broadcast on its station (Fdgs. ¶ 20). One of Central Florida's principals is a director of an educational institution with which Central Florida will be cooperating to provide educational programming (Fdgs. ¶ 25), and both Central Florida's principals who propose to work at the station have had experience utilizing and supervising student interns in the radio market, including interns from one of the same institutions that Central Florida proposes to use in internship programs for its proposed station (Id.).

3. The Presiding Officer, likewise, made no findings concerning the good past broadcast record of Central's principals, who will be working full-time at the proposed new facility, in owning and operating an FM station in the same radio market as that proposed for the new facility. For example, the Initial Decision ignored the fact that the station in question, WTLN-FM, broadcasts over three hours of public affairs programming daily, including a

program specifically designed to be responsive to community needs and an hour long program responsive to family issues (Edgs. ¶ 27). Other WTLN public affairs programming includes a program on financial management and a program, "Focus On Family," dealing, again, with family issues, and "Eleuthros," is a half-hour program, unique to the Orlando radio market, during which a rotating staff of counselors discuss the problems and traumas created by child sexual abuse and other forms of intra-family abuse (Id.). WTLN, under the management of Central Florida's principals, has participated as a sponsor or organizer in a number of community activities including: "the Food Drive for the Hungry," the most successful private food drive in the nation; "Family Expo," for the last five years a fair and exposition where local social service agencies, employment agencies, counseling services, and health care institutions provide information and outreach services; a city wide mental health clinic produced in conjunction with the Mirith-Meyer Clinic attended by approximately 400 local residents; a baseball clinic produced in conjunction with the Orlando SunRays baseball team designed to attract teenagers and teaching about the dangers of drug abuse and AIDS; and, a seminar at a local high school following Ted Bundy's execution during which students and trained experts explored the issue of sexual abuse, a seminar that was taped and broadcast several times on the station (Id.). WTLN also

does a large number of live remote broadcasts at offices of social services agencies and crisis centers which educate listeners on the services offered, including a recent live remote broadcast from the Crisis Pregnancy Center (Id.). The Presiding Officer also made no findings with respect to Central Florida's proposal to install an auxiliary generator at its studio and rely on an existing auxiliary generator at its transmitter site (Fdgs. ¶ 15).

II. QUESTIONS OF LAW PRESENTED AND SUMMARY OF ARGUMENTS

4. If the Initial Decision's conclusion--that Central Florida's application is entitled to a conclusive advantage under the 307(b) issue--is overturned, the following questions of law are presented for review.

- a. Whether the Presiding Officer erroneously ignored relevant facts concerning Central Florida's proposal and erred in not awarding it a preference under issue number two as better able to integrate its overall cultural and educational objectives into its proposed operation.
- b. Whether the Presiding Officer erred in not making relevant findings of fact and not awarding Central Florida a preference for its demonstrated superior ability to effectuate its proposals as another factor demonstrating its ability to provide a superior FM service.
- c. Whether the Presiding Officer erred in not making findings of fact relevant to or awarding Central Florida a preference for the demonstrated superior past broadcast record of its principals.

- d. Whether the Presiding Officer erred in not making findings of fact relevant to or awarding Central Florida a preference for its auxiliary power proposal.

III. ARGUMENT

A. Integration of Objectives

5. Central Florida at the outset notes that the issue designated by the Commission in his case--the integration the proposed operations into the cultural and educational objectives of the applicant--is an issue that has perplexed the Review Board and subordinate Commission officials and been criticized for its vagueness and seeming irrelevance to real issues impacting on the public good. See, e.g., Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd. 2577, 69 Rad. Reg. 2d (P&F) 420, 423, n.8 (Rev. Bd. 1991); Black Television Workshop of Santa Rosa, Inc., 65 Rad. Reg. 2d (P&F) 34 (Rev. Bd. 1984). Despite these criticisms, however, the Commission and the Mass Media Bureau are still designating the issue in noncommercial educational FM cases, even though the Commission has recently revised one of the other issues normally designated in noncommercial cases. Real Life Educational Foundation of Baton Rouge, Inc., supra. Accordingly, so long as the issue is being designated subordinate officials and applicants are required, as best they can, to make rational distinctions based on the record evidence presented in each case. Neither the Presiding Officer nor the Review Board may ignore clear and

decisive advantages under a designated issue simply because they are uncomfortable with the issue or disagree with the philosophy behind its designation. Cf. Atlantic Broadcasting Corp., 4 F.C.C.2d 943, 8 Rad. Reg. 2d (P&F) 599 (Rev. Bd. 1966). The record in this case, moreover, shows that if ever an applicant warranted a preference under this issue, Central Florida is that applicant.

6. While the Commission has, traditionally, had difficulty providing an intellectual framework for evaluating applicants under the rubric of the applicant's "integration" of their cultural and educational objectives into station operation. Commission cases have established a few benchmarks, however, in comparing applicants. The applicant's objectives must be outward looking, not inward looking. Seattle Public Schools, 4 FCC Rcd. 625, 65 Rad. Reg. 2d (P&F) 1621, 1644 (Rev. Bd. 1989). The applicant's objectives should be geared to meeting the public's needs. Id., 65 Rad. Reg. 2d (P&F) at 1635. Similarly, while the Commission has been vague about what "integration" means, it means, at least, that the applicant has a plan or mechanism to ensure that the applicant's objectives are somehow effectuated in the operation of the station. As the Commission stated in New York University, 19 F.C.C.2d 358, 17 Rad. Reg. 2d (P&F) 104,116 (Rev. Bd. 1969), the issue "... pertains to the manner in which the control of the station will be maintained and the assurances this gives of the

continued operation of the station in a manner consonant with the operation and objectives of the [applicant]." In this instance, too, the record shows that the Commission is not comparing two intrinsically different sorts of applicants, such as a public or private educational institution with a nonprofit educational organization. Here both applicants are nonprofit educational organizations.

7. Central Florida's eight objectives are clearly "outwardly" directed, either because they serve to further a community need or seek to use the station to further the educational program of a local educational institution (Edgs. ¶ 16). In its proposals to provide an internship opportunity to students of identified local educational institutions, to broadcast news and other programs produced by the students of local educational institutions, and its proposal to broadcast instructional programming in conjunction with local educational institutions (Edgs. ¶ 17), Central Florida deserves credit for proposing to "bring to the metropolitan community the resources of the university." New York University, supra, 19 F.C.C.2d at 368. See, also, Seattle Public Schools, supra, 69 Rad. Reg. 2d (P&F) at 1644. Central Florida's objectives, moreover, particularly with respect to the broadcast of family programming, and the provision of internship opportunities for local students, are logical

outgrowths of programs with which Central Florida's principals have been in the past or are currently involved (Fdgs. ¶ 25). See, New York University, Id. One of Central Florida's principals, Mr. Hoge, who will work full-time at the station, also serves as a principal (a director) of one of the educational institutions with which the station will work to produce educational programming and which will provide student interns to work at the station (Fdgs. ¶ 25). Central Florida's objectives are also based on ascertained community needs, particularly, objectives three, four, five, six and eight (Fdgs. ¶ 19-23).

8. By way of contrast, Hispanic's sole articulated objective is a general one, to provide a Hispanic broadcast service, but it has neither proposed specific programs or specific institutions (with the exception of a vague reference concerning "access" for Lake Mary Community College, Fdgs. ¶ 11), through which it will work. Nor does Hispanic have any articulated plans or proposals to ensure that its objective will be integrated into station operation, which is particularly glaring in view of the fact that all Hispanic's directors have long standing business ties to Puerto Rico. Two of Central Florida's directors will work at its station full-time, and, although the Commission has stated that "... our standard comparative criteria...are virtually meaningless," New York University, 10 Rad. Reg. 2d (P&F) 215, 217 (1967), clearly the

fact that two of its principals will work at the station is some assurance that the educational and cultural objectives adopted by the corporation will be faithfully implemented in station operation. Hispanic offers no specific plan for station operation at all, other than to say that two of its directors have broadcast experience and one is an educator. Central Florida proposes objectives which are outwardly directed, are based on the needs of the community, in some instances are logical outgrowths of existing programs in which its principals are involved, are to be implemented, in at least one instance, by a person who is a principal of the educational institution involved, and in every instance by two of Central Florida's three directors who will work at the station full-time. Central Florida warrants a solid preference under this issue. See, New York University, supra, 17 Rad. Reg. 2d (P&F) at 116.

B. Superior Ability to Effectuate proposals

9. The Presiding Officer also erred in not making necessary findings of fact and concluding that Central Florida was entitled to a preference under the "other factors" issue because Central Florida's proposals are more certain, clear, capable of implementation and likely to be implemented when compared with the proposals of Hispanic. Central Florida has proposed a complete and specific program schedule (I.D. ¶ 9) prepared on the basis of an

extensive ascertainment of the service area's needs, Hispanic proposes no program schedule at all (Fdgs. ¶ 19, 21-24, 11). Central Florida's programs and proposals are based, in some instances, on existing programs (Fdgs. ¶ 23, 25), Hispanic's is not. Central Florida's proposal includes two of its principals who will work at its station full-time (Fdgs. ¶ 25), Hispanic has submitted no plans for station operation (Fdgs. ¶ 14). Central Florida's principals who will work at the station have experience in owning and operating noncommercial stations (Fdgs. ¶ 26), Hispanic's principals do not (Fdgs. ¶ 14). Central Florida's principals who will work at the station have a combined total of 27 years broadcast experience in the proposed station's radio market, the broadcast experience of Hispanic's principals is confined to the island of Puerto Rico (Fdgs. ¶ 26, 14). Central Florida's principals have experience as principals of an educational institution in the Orlando area, propose to work with schools with whom they have a legal connection, like CCS, and initiate internship programs and programs with schools with whom they have worked in the past like RTS and Stetson (Fdgs. ¶ 25). Hispanic has no discernible local ties, and no specific proposal to implement. Accordingly, Central Florida should also receive a preference for the fact that its proposals are more detailed, well-conceived and capable of quick effectuation than those of Hispanic. "In terms of

initiation of service and the likely development of proposed programming," Central Florida's plan is more certain and therefore superior to the plans of Hispanic. East Tennessee Public Communications Corporation, FCC 87D-2 (Initial Decision, ¶ 30, released Feb. 3, 1987).

C. Central Florida Should Receive Credit for the Good Past Broadcast Record of Its Principals

10. Central Florida is not aware of any case in which the proposed principals of a noncommercial station received credit for their good past broadcast record. Commercial applicants have, of course, been receiving such credit in comparative cases since the Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 5 Rad. Reg. 2d (P&F) 1901 (1965), for an "unusually good" or an "unusually bad" record. However, since the Commission has repeatedly held that an applicant's past record is the best predictor of future performance, see, e.g., Knoxville Broadcasting Corp., 103 F.C.C.2d 669, 59 Rad. Reg. 2d (P&F) 1617, 1639 (Rev. Bd. 1986), the record of Central Florida's principals should have been considered here, and Central Florida should receive credit for the superb past broadcast experience of Messrs. Hoge and Moffit at WTLN. The evidentiary predicate for the award of credit is present in this record: experience in the same service (FM radio); experience in the same market: experience as an owner and/or in a responsible management level position; a pledge to work at the

proposed new station in a responsible management level position a significant number of hours per week (here two principals will be working at the station full-time); and, an outstanding record of service to the community. WTLN's outstanding record includes more than 15 hours per week of public affairs programming (Fdgs. ¶ 27), as well as record evidence of extensive efforts to ascertain the communities problems, needs and interests through community leader interviews, monitoring the called in concerns of persons participating in the station's call-in public affairs programming and other local media. WTLN's programming regularly responds to the ascertained needs with programs such as " Central Florida Forum," which is a call-in program specifically designed to respond to community needs, and programs specifically included in the program schedule to deal with community needs, such as programs responsive to family problems and issues like "Life Perspectives" and "Focus on the Family." WTLN's response to community needs has caused it to produce innovative and daring programming as well, such as its weekly program "Eleuthros," which discusses the problems and traumas created by child sexual abuse, and other intra-family abuse. This program, both in format and subject matter, is unique in the Orlando radio market and was created to deal with the problems of child sexual abuse mentioned in repeated community leader interviews (Id.). It is a demonstrated

"sensitivity to the area's changing needs through flexibility of programming designed to meet those needs ... [which] takes a past record out of the bounds of average performance." WHDH, Inc., 16 F.C.C.2d 1, 15 Rad. Reg. 2d (P&F) 411, 425 (1969). Certainly WTLN's pioneering programming dealing with an issue whose prevalence has only recently been recognized, such as child sexual abuse, is an example of providing innovative programming in response to new issues and needs.

11. WTLN also has an outstanding record of community outreach, such as organizing a seminar of local high school students after the Ted Bundy execution to discuss sexual abuse, a seminar which was taped and broadcast several times on the station. Other community outreach projects have included organizing seminars for local residents on community mental health and financial management to help residents cope with the recession, and a skills clinic with a local professional baseball team to bring teens and their dads to a clinic where they heard baseball players discussing teen problems such as alcohol and drug abuse, and AIDS. WTLN was a main sponsor of the recently concluded "Food Drive for the Hungry", and for five years has organized and sponsored "Family Expo," a service fair in which agencies, ministries, institutions and others who serve the needs of the family gather to distribute information about their services. WTLN does live remote broadcasts

on a regular basis at local ministries and social service agencies, such as the Crisis Pregnancy Center, to give publicity to the agencies and the services they offer. A record of community outreach and involvement has been recognized as a factor in a good past broadcast record. United Broadcasting, Inc., 100 F.C.C.2d 1574, 57 Rad. Reg. 2d (P&F) 885 (1985). WTLN's record is exemplary, and shows that the station has been dynamic in its involvement in the community, closely attuned to community needs and showing special sensitivity and flexibility in meeting those needs, such as in its organization of a seminar on sexual abuse which was broadcast following the execution of Ted Bundy (Edgs. ¶ 28). WTLN has also showed great creativity in responding to those needs in, for example, organizing a baseball clinic during which often hard to reach teenagers heard professional ballplayers discussing teen problems such as AIDS and drug abuse (Id.). Given this record of proven performance by two of its principals, Central Florida warrants a strong preference for this superior past broadcast record.

**D. Central Florida Should Be Preferred for Its
Auxiliary Power Proposal**

12. Finally, Central Florida warrants a slight preference for its proposal to install emergency power equipment at both its transmitter and its studio. Real Life Educational Foundation of

Baton Rouge, Inc., 6 FCC Rcd 2577, 69 Rad. Reg. 2d (P&F) 420, 424 (Rev. Bd. 1991).

IV. CONCLUSION

13. As noted above, Central Florida's exceptions are contingent in that it fully supports the Presiding Officer's conclusion that Central Florida be granted a dispositive preference based on its vastly superior service to underserved areas pursuant to section 307(b). However, should that determination be appealed and overturned, Central Florida argues that the Presiding Officer erred in not making necessary and unchallenged findings of relevant facts, and in failing to award Central Florida demonstrable preferences for, its superior integration of its operation into its cultural and educational objectives; the superior specificity of its proposals and its demonstrably superior ability to effectuate its proposals under the "other factors" issue; the superb past broadcast record of its principals in operating a radio station in the same market; and, for failing to grant Central Florida a preference for its auxiliary power proposal.

Respectfully submitted,

**CENTRAL FLORIDA EDUCATIONAL
FOUNDATION, INC.**

By: 
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CERTIFICATE OF SERVICE

I, Glinda Corbin, a paralegal in the law offices of May & Dunne, Chartered, hereby certify that I have caused to be sent this 16th day of October 1992, via first class U.S. mail, postage prepaid, a true and correct copy of the foregoing CONTINGENT EXCEPTIONS TO INITIAL DECISION to the following:

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